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June 12, 1992

Donna R. Searcy, Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: MM Docket No. 92-52
Review of the Commission's Regulations
and Policies Affecting Investment In
the Broadcast Industry

Dear Ms. Searcy:

On behalf of our client, CVC Capital Corporation, transmitted herewith for filing are an original and nine (9) copies of its "COMMENTS OF CVC CAPITAL CORPORATION (A "MESBIC")" in the above-referenced rulemaking proceeding.

Please direct all inquiries and communications concerning this matter to the undersigned.

Very truly yours,


Jerold L. Jacobs

Enc.

cc: As on Certificate of Service (all w/enc.)

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JUN 12 1992

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re)
)
Review of the Commission's) MM Docket No. 92-51
Regulations and Policies)
Affecting Investment)
In the Broadcast Industry)

TO: The Commission

COMMENTS OF CVC CAPITAL CORPORATION (A "MESBIC")

CVC CAPITAL CORPORATION ("CVC"), by its attorneys and pursuant to §1.415(a) and (b) of the Commission's Rules, hereby submits its Comments in response to the Commission's Notice of Proposed Rule Making and Notice of Inquiry, FCC 92-96, 57 Fed. Reg. 14684 (published April 22, 1992) ("NPRM"), in the above-captioned rulemaking proceeding. In support whereof, the following is shown:

I. BACKGROUND and INTRODUCTION

1. CVC is a Minority Enterprise Small Business Investment Company ("MESBIC") which specializes in loans to broadcast stations. CVC's President is Joerg G. Klebe, who is an experienced broadcast lender. Like all MESBICs, CVC's mission is to provide equity funds, long-term loans, and management assistance to small business concerns owned by socially or economically disadvantaged persons.

2. Illustrative of CVC's investment activities is Lynn Broadcasting, FCC 92D-31 (I.D. May 1, 1992) (attached hereto

as Exhibit 1), a recent comparative broadcast proceeding, in which the Presiding ALJ held that Jamal Broadcasting, L.P. ("Jamal") was financially qualified (based on a \$500,000 loan commitment by CVC) and awarded it a construction permit for a new FM station at Mt. Juliet, Tennessee. Jamal is a limited partnership in which Michael Grant, an African American, is the general partner and holds 25% of the partnership's equity.

3. In concluding that CVC's loan commitment was adequate, the ALJ noted (*id.* at ¶4) that CVC required Jamal to provide the partnership's accounts receivable, inventory, equipment, and any other station assets as collateral for the loan, as well as any personal and real property which Mr. Grant owned when the loan was made. However, at the time the loan commitment was made, Mr. Grant had no personal or real property assets which could serve as collateral (*id.* at ¶32).

4. Mr. Grant's lack of private capital is common among emerging minority entrepreneurs, and MESBICs like CVC are prepared to provide investment assistance where other venture capital sources would shy away. Indeed, as the Commission itself noted in FCC Minority Ownership Task Force Report, Minority Ownership in Broadcasting (May 1978), n. 32:

[T]he investment policy of the MESBIC program is to provide assistance solely to small business concerns which are at least 50% owned and managed by socially or economically disadvantaged individuals...[and] these businesses are primarily owned by members of recognized minority groups.

As CVC will now show, it strongly supports the maximum relief offered to MESBICs by the NPRM as a needed stimulus for further investment in minority-controlled broadcast properties.

II. GIVING MESBICs PASSIVE INSTITUTIONAL STATUS
AND A 20% ATTRIBUTION BENCHMARK IS APPROPRIATE

5. CVC fully endorses the general premise underlying the NPRM (at ¶1) that:

[R]educing unnecessary regulatory restraints on investment in the broadcast industry...is necessary to ameliorate the difficulties that new entrants to this industry, including, in particular, minorities and women, have experienced in obtaining adequate financial backing and in successfully breaking into broadcast ownership.

CVC has long known that while the Commission held in Attribution of Ownership Interests, 97 FCC 2d 997, 1016-17 (1984), that it would not accord "passive status" to MESBICs for ownership attribution purposes, CVC and other MESBICs could obtain the same result by various "insulating" mechanisms such as (1) nonvoting common or preferred stock, (2) various nonvoting interests carrying rights of conversion to voting interests, such as convertible nonvoting stock and convertible debentures, as long as such interests remain unconverted, (3) voting stock held through qualified voting trusts, (4) minority voting stock interests where a single majority stockholder exists, and (5) properly insulated limited partnership interests. See February 26, 1988 Letter to David E. Honig, Esq. ("Letter") from Chief, Mass Media Bureau (attached hereto

as Exhibit 2). Indeed, CVC originally proposed to be a limited partner in Lynn Broadcasting, supra at ¶3.

6. However, CVC respectfully disputes the Commission's view in Attribution of Ownership Interests, supra at 1016 and in the Letter, supra at 2, that the above-noted noncognizable investment mechanisms "should satisfy the investment flexibility needs of [MESBICs] without extension to them of passive status". Again using the Lynn Broadcasting case for illustrative purposes, when Jamal opted not to have CVC as a limited partner, CVC still agreed to lend it \$500,000, but did so without acquiring any nonattributable (or attributable) ownership interest in Jamal and only minimal investment protection. See Paragraphs 3-4, supra. Thus, CVC maintains that present Commission policy does not give MESBICs adequate investment flexibility (or protection).

7. Under these circumstances, CVC believes that, as proposed in the NPRM (at ¶11), according MESBICs the presumption of passivity and the ability to hold up to 20% of a company's voting stock without incurring attribution under the Commission's ownership rules will provide much needed additional flexibility and true broadcast investment encouragement to MESBICs.

8. The Commission recognized in Attribution of Ownership Interests, supra at 1016 n.45, that although MESBICs are generally prohibited from assuming control of the companies in which they invest, they are authorized to exercise control

over debtor companies for temporary periods under specified conditions. 13 CFR §107.801 of the Small Business Administration's Rules establishes guidelines for such temporary control, which may be via voting stock ownership, management agreements, voting trusts, majority representation on a board of directors, or otherwise. Obviously, MESBICs which avail themselves of such control mechanisms will lose their "passive" nonattributable status and will require appropriate prior Commission approval. CVC submits that the NPRM's proposed changes in the attribution rules present a useful ownership/investment alternative to such temporary control.

III. MESBICs AND OTHER LENDERS NEED SECURITY OR REVERSIONARY INTERESTS IN BROADCAST LICENSES

9. CVC also fully supports allowing MESBICs and other lenders to obtain security interests or reversionary interests in broadcast licenses, as discussed in Paragraphs 22-23 of the NPRM. It is clear that such interests will increase capital availability and are essential to stimulating investment in minority-controlled broadcast properties.

10. In CVC's experience, minorities rarely have sufficient financial resources to provide any portion of the funds needed for station construction, so that in effect the entire acquisition financing is supplied by CVC. Because minorities generally also do not have sufficient other collateral to secure the loan (see Paragraphs 3-4, supra), foreclosure on

the broadcast station is the only option in the event of default -- and a very unsatisfactory and cumbersome one.

11. Moreover, as the Commission observed in the NPRM (at ¶21), there is a "split of opinion" in recent bankruptcy court cases regarding the permissibility of security interests in broadcast licenses and the valuation of a broadcast lender's lien on all assets of a broadcast station other than the license. Compare Tak Communications, Inc. v. New Bank of New England, Case No. 91-C-935-C (W.D. Wis. Mar. 23, 1992), aff'ing Case No. MM11-91-00031 (Bankr. W.D. Wis. Sept. 24, 1991), with In re Ridgely Communications, Inc., Case No. 89-5-1705-JS (Bankr. D. Md. Nov. 21, 1991). This uncertainty and the related potential loss exposure further diminish the desire of MESBICs and other venture capitalists to lend funds to broadcast stations in general and to minority-owned stations in particular.

12. CVC urges that there are neither statutory nor policy bars to a Commission determination in this proceeding that MESBICs and other lenders may obtain security interests or reversionary interests in broadcast licenses. CVC believes that the Commission effectively decided these questions affirmatively in Bill Welch, 3 FCC Rcd 6502 (1988), when it held that there was no statutory bar to the sale of a "bare" construction permit for a cellular authorization. Although Bill Welch, in its terms, applies only to cellular licenses, CVC submits that Bill Welch's legal reasoning and analysis of

pertinent legislative history are unassailable and are fully dispositive for broadcast licenses, so that there is no principled way to limit Bill Welch to cellular licenses alone.

13. As to the policy implications of allowing MESBICs and other lenders to have security interests or reversionary interests, CVC believes that the concerns raised in Paragraph 23 of the NPRM are exaggerated -- especially the fears that creditors will attempt to exercise control or have substantial influence over a borrower station or that safeguards will be necessary to ensure that transfers of control do not take place without the Commission's prior approval. In CVC's view, these potential dangers are no greater than what presently exists with unsecured creditors and minority voting owners who attempt to exceed the bounds of the Commission's "control" rules and policies.

14. At bottom, the Commission looks to the broadcast industry to police itself in such matters, assisted by Commission field inspections and "private attorneys general". CVC believes that these existing regulatory mechanisms, plus the sobering possibility of short-term license renewal, non-renewal, or revocation, are sufficient to dissuade malfeasors.

15. Similarly, CVC sees no legal difficulty with applying the proposed rule and policy changes to existing contracts (NPRM, ¶23), if such contracts already contain security interest or reversionary interest language. Any such language was agreed to by the parties, even if unenforceable

at the time. Indeed, in many instances, existing contract language specifically envisioned the possibility of changed Commission policies. In all of these instances, CVC maintains that contract obligations will not be impaired or expanded beyond what the parties originally negotiated by the "retro-active" application of new Commission policies on security interests and reversionary interests.

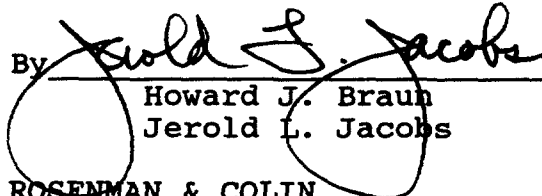
IV. CONCLUSION

16. As CVC has shown, deregulation of certain of the Commission's current restraints on MESBICs and other providers of minority broadcast investment capital are fully warranted. If adopted, the NPRM's new investment rules and policies will clearly help to stimulate investment in minority-controlled and non-minority broadcast properties, consistent with the paramount public interest.

Respectfully submitted,

CVC CAPITAL CORPORATION

By


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Its Attorneys

Dated: June 12, 1992

Federal Communications Commission

FCC 92D-31

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-84

In re Applications of

GRADY LYNN and File No. BPH-891011MJ
CAROL LYNN
d/b/a LYNN
BROADCASTING

EDITH M. GELFAND File No. BPH-891012MN

JAMAL File No. BPH-891012MS
BROADCASTING, L.P.

Q PRIME, INC. File No. BPH-891012MT

For Construction Permit for a
New FM Station on Channel 294A
in Mt. Juliet, Tennessee

Appearances

Timothy K. Brady on behalf of Grady Lynn and Carol Lynn d/b/a Lynn Broadcasting; *Lawrence J. Movshin* and *Robert L. Hoggarth* on behalf of Edith M. Gelfand; *David Honig* on behalf of Jamal Broadcasting, L.P.; and *Howard M. Liberman* on behalf of Q. Prime, Inc.

INITIAL DECISION OF ADMINISTRATIVE
LAW JUDGE EDWARD J. KUHLMANN

Issued: April 20, 1992;

Released: May 1, 1992

1. Eleven applications were designated for comparative hearing to determine who should be awarded this facility in Mt. Juliet, Tennessee. *Hearing Designation Order*, 6 FCC Rcd 2108 (MM Bur. 1991). Four applicants remain. The following issues will be considered in this decision:

1. (a) To determine whether Jamal Broadcasting, L.P. is financially qualified.
- (b) To determine whether Jamal Broadcasting, L.P. falsely certified that it was financially qualified.
- (c) To determine in light of the evidence on (a) and (b) whether Jamal Broadcasting, L.P. is qualified.
2. To determine which of the proposals would, on a comparative basis, best serve the public interest.
3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications, if any, should be granted.

2. A prehearing was held on June 19, 1991. Tr. 1-13. Written testimony was exchanged on September 12, 1991. An admissions session was held on September 19, 1991 (Tr. 14-116); oral examination of written testimony was heard on September 25, 1991 (Tr. 117-408) and September 26, 1991. Tr. 409-605. Additional written testimony was exchanged on January 24, 1992 and oral examination of that testimony took place on February 3, 1992. Tr. 606-767. The record was closed on September 26, 1991 and reopened and closed finally on February 3, 1992. Proposed findings and conclusions were filed by Lynn, Gelfand, Jamal, Prime, and Walker on November 8, 1991 and by Lynn and Jamal on February 24, 1992. Replies were filed on December 4, 1991 by Lynn, Jamal, Gelfand, and Walker and by Lynn and Jamal on March 3, 1992.

FINDINGS OF FACT

Issue 1: Whether Jamal is financially qualified and whether it falsely certified its qualifications.

3. Michael Grant, the only general partner in Jamal, originally applied for this facility, on October 12, 1989, as a sole proprietor. Jamal Exh. 1, at 1 and Jamal Exh. 26, at 1. He intended initially to apply as a limited partnership with CVC Capital Corporation as the limited partner. Jamal Exh. 26, at 1. Under their proposed partnership, CVC intended to lend Jamal the money to build the station and operate it. *Id.*, Tr. 641. During the negotiations between Grant and Joerg Klebe, CVC's president, Grant told Klebe about his broadcast knowledge, management background and plans for the station. Jamal Exh. 26, at 1. Klebe was provided on October 4 and 5, 1989 with Grant's financial plan for the station and his personal financial statement. Jamal Exh. 26, at 2. Grant discussed his financial plan with Klebe and following that discussion, on October 6, 1989, Klebe, on behalf of CVC, wrote to Grant and provided reasonable assurance for a loan for Jamal Broadcasting, L.P. Jamal Exh. 26, at 3. It was still intended on that date that CVC would become a limited partner in Jamal. *Id.*

4. Klebe and Grant discussed collateral for the loan and Grant understood that Jamal would have to provide as collateral the partnership's accounts receivable, inventory, equipment, and any other station assets. *Id.* In addition, Grant would have to pledge any personal and real property he owned when the loan was made. *Id.* CVC's Klebe was aware that Grant had no real property at the time the letter was written. Jamal Exh. 26, at 3-4; Jamal Exh. 27, at 4-5. And ownership of real property was not a condition of the loan. Jamal Exh. 27, at 6. Klebe said that the collateral for the loan was discussed when he went over the terms for the loan with Grant. Jamal Exh. 27, at 7. Grant wrote to Klebe on October 6, 1989 and told Klebe that he was willing to provide the required collateral for the loan. Jamal Exh. 26, at 4. On October 7, 1989, Grant concluded that he did not want to have CVC as a partner. *Id.*, at 5. Nevertheless, CVC and Grant assumed that CVC would still provide financing for the Mt. Juliet proposal. On October 9, 1989, Grant told CVC that he estimated that it would cost \$27,050 to prosecute the application. *Id.*, at 5-6. Grant intended to pay the prosecution costs himself from his income as the litigation progressed. *Id.*, at 5.

5. On October 10, 1989, Klebe told Grant that, even though CVC was not going to become a partner, CVC would still lend Jamal or Grant \$500,000. Jamal Exh. 26,

at 6. However, without CVC participating as a partner, Grant would have to pay CVC \$750 for its commitment. *Id.* Grant said he learned later that CVC's loan could not be used for the \$15,000 in legal expenses he estimated would be incurred putting the station on the air after a grant was made. *Id.* On October 12, 1989, Grant filed for this facility and on the preceding day, October 11, 1989, CVC sent a letter promising to lend Grant, as an individual applicant, the \$500,000. *Id.*, at 7. To meet prosecution expenses, Grant agreed to a monthly payment plan with his counsel and engineer. Jamal Exh. 26, at 7. These payments were agreed to orally and were codified in a memorandum Grant sent to them on October 11, 1989. *Id.*

6. On January 26, 1990, Grant amended his application to change from an individual applicant to a limited partnership. Jamal Exh. 26, at 8. Grant told CVC that he was going to have a limited partner, United Communications, Inc., and Grant asked CVC to reconfirm its willingness to lend to the new partnership. *Id.* On January 19, 1990, CVC told Grant that it would lend to the partnership he was forming with United Communications, Inc. *Id.* Grant amended his application to reflect the new owners and the change in his financial certification. *Id.*

7. Mr. Klebe is the only officer and employee of CVC and its only owner through Transtel, which he also owns. Tr. 630; *Id.* CVC specializes in loans to broadcasters. Tr. 631. Because Klebe believes that the standard of reasonable assurance for broadcast loans varies from time to time, he relies on advice from legal counsel to insure that CVC's promise to a borrower meets FCC standards. Tr. 643-44, 647. Before providing assurance to Jamal, Klebe looked at Jamal's proposal to see if it was viable and he determined that it was one he would finance. Tr. 647-48. When questioned about the provision of legal fees in Jamal's budget, Klebe said that the \$15,000 in legal fees would not be covered if they related to obtaining the construction permit. Tr. 653. But he added that legal fees for start-up work could be paid for by the loan. Tr. 654. The \$15,000 item listed on Jamal Exh. 18, at 26 is for legal fees "which may not have been covered by capital calls." If those legal fees are for prosecution of the application, they will not be covered by the CVC loan. Tr. 656.

8. Grant pledged to pay \$27,050 for obtaining the permit. Tr. 702-03. He originally believed that he could use the loan from CVC Corporation to meet part of that amount and, therefore, he listed it in his budget. Tr. 703. Grant had reached an agreement with his engineer and attorney before October 11, 1989 in which he promised to make payments on the prosecution costs. Tr. 714-15. Grant states he has made the payments. Tr. 715.

Issue 2: Which proposal would, on a comparative basis, best serve the public interest.

Diversification of control of the media of mass communications

Lynn

9. Lynn is a general partnership with two equal partners, Grady and Carolyn Lynn. Lynn Exh. 1, at 1. Lynn and its partners have no interest in the media of mass communications. *Id.*

Gelfand

10. Gelfand is the individual applicant Edith M. Gelfand. Gelfand Exh. 3, at 1. Ms. Gelfand has no interest in the media of mass communications. *Id.*, at 2. Her spouse, however, owns KIQY-FM, Lebanon, Oregon and holds a permit for KKTM-TV, Flagstaff, Arizona. *Id.* Ms. Gelfand maintains she does not participate in their operations. Tr. 450-53.

Jamal

11. Jamal is a limited partnership. Jamal Exh. 7, at 1. The general partner is Michael Grant. *Id.* Grant owns a 25 percent equity interest in Jamal and United Communications, Inc., Jamal's only limited partner, owns a 75 percent equity interest. *Id.*, at 10, 11. Jamal and its partners have no interest in the media of mass communications. Jamal Exh. 2, at 1. Dr. James Freemont, a 12.5 percent stockholder in UCI, owns 50 percent of the equity and is the only limited partner in TFB Associates Limited Partnership. Jamal Exh. 2. TFB owns 33 percent of T. Wood & Associates, Inc., the permittee of a new FM station licensed to Hogansville, Georgia. *Id.* Freemont has a 16.5 percent interest in the licensee through his ownership of TFB. *Id.*

Prime

12. Prime is a corporation owned in equal shares by Clifford N. Burnstein and Peter D. Mensch. Prime Exh. 1. They are also Prime's officers and directors. *Id.* Burnstein and Mensch are officers and directors and equal owners of Ionosphere Broadcasting Corporation, Stratosphere Broadcasting Corporation, Troposphere Broadcasting Corporation and Atmosphere Broadcasting Corporation. Prime Exh. 3, at 1. The corporations are the general partners in limited partnerships having the same names. Ionosphere Limited Partnership holds a construction permit for an FM station in Woodlake, California. Stratosphere Limited Partnership holds a construction permit for an FM broadcast station in Los Osos-Baywood Park, California. Troposphere Limited Partnership holds a construction permit for an FM station in Greenfield, California; and Atmosphere owns all the stock in Double D Broadcasting Company, the licensee of KRAB-FM, Green Acres, California. *Id.* Burnstein and Mensch are the only limited partners in each entity and the only officers and directors in Double D Broadcasting. *Id.*

Integration of ownership into management**Lynn**

13. Both Grady Lynn and his spouse, Carolyn Lynn, the only owners and equal general partners of Lynn, propose to work full time, 40 hours per week, at the station. Lynn Exh. 2, at 1. Grady Lynn will be the general manager. *Id.* He will supervise all phases of the station operation. *Id.* Mr. Lynn will quit his current employment. *Id.* Carolyn Lynn will supervise all aspects of the station's business and financial affairs, establish financial policy and supervise sales. *Id.* She will also supervise various matters relating to programming and equal employment opportunity. *Id.*

14. Ms. Lynn owns Batteries Unlimited, Inc. which now takes 15 hours per week of her time. *Id.* In her written testimony she stated that she will sell this business if a grant is made to Lynn. But at the hearing she said she will "probably" sell the business. Tr. 403. She has owned the business for many years and has made no plans for its sale. *Id.*; Tr. 404.

15. Mr. Lynn decided to locate a frequency in the Mt. Juliet area. Tr. 366. He retained the engineer, the attorney for the process of obtaining the frequency, and established the public file at his business address. Tr. 366, 418. Mr. Lynn also located the antenna site and arranged for the site with the land owner. Tr. 419-20. Despite Ms. Lynn's claim that she will oversee EEO compliance, it was Mr. Lynn who designated the EEO recruitment sources listed in Lynn's application. Tr. 372-73. Lynn's financial certification was based on Mr. Lynn's personal financial statement. Tr. 376. Mr. Lynn said his wife would work as the office manager/business manager at the station. Tr. 386. He referred to her role as being business manager and bookkeeper. *Id.* When the Lynns operated a previous business together, the Battery Shop, Ms. Lynn was the business manager. Tr. 420-21.

16. The Lynns have lived in Mt. Juliet since 1976. Lynn Exh. 2, at 1-2. The Lynns also lived in Nashville from 1970 to 1976; Nashville is within the primary service area of the proposed station. Lynn Exh. 2, at 2. Mr. Lynn joined the Mt. Juliet Masonic Lodge in 1976 and the Big Brothers in 1976, established an orphanage in Mt. Juliet between 1984 and 1988, established a senior citizens organization for Mt. Juliet in 1977, served on the board of the Senior Citizens Organization and Center from 1978 to 1989, from 1978 to 1988 raised funds and donated equipment for the Mt. Juliet Fire Department and Rescue Squad, served on a government committee in 1987, from 1977-85 served on the Mt. Juliet City Planning Commission, served as an elected local official from 1983-1987, donated and helped establish a local park in 1984, founded the Mt. Juliet Theatre in 1987, donated land for the Mt. Juliet Library between 1983 to 1987, volunteered at a local school in 1988-89, provided emergency assistance to the police in 1983, member of Chamber of Commerce since 1978, and charter member of the Mt. Juliet Rotary Club since January 1990. Lynn Exh. 2, at 3-9.

17. Ms. Lynn has been a member of the Business and Professional Womens Association of Mt. Juliet since 1982, a member of a political party organization during 1983-84, raised money for local charities since 1986, participated in fundraising for Big Brothers since 1976, joined her spouse in establishing the orphanage between 1984 and 1987, joined her spouse in establishing a senior citizens organization between 1977 and 1984, raised funds for the

Mt. Juliet Fire Department and Rescue Squad, assisted the city government in various projects between 1983-85, donated land for a park and library between 1985 and 1987, and founded the Mt. Juliet Theatre in 1987. Lynn Exh. 3, at 2-5. Ms. Lynn is female. *Id.*, at 2.

Gelfand

18. Gelfand is an individual applicant. Gelfand Exh. 3, at 1. She proposes to work full time, 40 hours per week, as the general manager of the station. Gelfand Exh. 3. Gelfand will oversee construction and be in charge of all aspects of the station's operation. *Id.*

19. Gelfand will curtail her other business and professional activities in order to carry out her integration proposal. Gelfand Exh. 3. While Ms. Gelfand is a lawyer, she no longer has an active practice. Tr. 437. Along with her spouse, Ms. Gelfand has owned a music publishing company in Nashville since 1981. Gelfand Exh. 3, at 2. She also owns real estate with her spouse. Tr. 444. Ms. Gelfand relies on her spouse for support and she has used funds from a joint account to fund her proposal for this station. Tr. 464. Ms. Gelfand said she intends to transfer money from a personal account to the joint account but she has not done so. *Id.* She has hired the same lawyer and technical consultant as her spouse has. Tr. 441-42. Ms. Gelfand has relied on her spouse for general advice because of his greater experience in communications and she anticipates discussing the station with him. Tr. 446-50. In her application Gelfand represented that she has no material business interests in common with her spouse and that she does not participate in any way with his media interests. Nevertheless, she is familiar with the operation of her spouse's radio station; she knows the format, who the general manager is, whether the station is profitable; and she knows why her spouse has not constructed television station KKTm(TV). Tr. 452-53. She also is consulted by him about legal matters relating to the stations. Tr. 449-50.

20. Gelfand lives in Palm Beach, Florida but she has access to an apartment in Nashville which she will make her primary residence if her application is granted. Gelfand Exh. 3; Tr. 433, 456. The Nashville apartment is owned by her publishing company, Mid-Summer Music, Inc. Tr. 444. Beginning in May 1989, Gelfand has spent a few days every four to six weeks in the Nashville apartment. Tr. 433. She votes and pays taxes in Palm Beach. *Id.* Gelfand also has a Washington, D.C. apartment. Tr. 435. Gelfand's spouse operates a medical practice in Bethesda, Maryland. Tr. 434. Ms. Gelfand did not know whether her "home residence" would be in Nashville, Palm Beach, or Washington. Tr. 434-35. During the proceeding, Ms. Gelfand asserted an attorney-client privilege over twelve letters sent to her by her counsel between October 9, 1989 and May 24, 1991. Prime Exh. 5. No more than one of those letters, if that, Ms. Gelfand said, was sent to her in Nashville. Tr. 444. A letter from her technical consultant was sent to her in Bethesda, Maryland, on November 21, 1989, and a letter from a Nashville law firm about the purchase of Mid-Summer Music, Inc.'s apartment was sent in care of Michael C. Gelfand to a Rockville, Maryland address. Prime Exhs. 6 and 7. Ms. Gelfand is female. Gelfand Exh. 3, at 2.

Jamal

21. Jamal is a limited partnership in which Michael Grant is the general partner and United Communications, Inc. is the limited partner. Jamal Exh. 1, at 1. Grant holds 25 percent of the partnership's equity and UCI holds the remaining 75 percent. *Id.* UCI is owned by 13 individuals; the single largest shareholder, Lawrence Doss, is the President, Treasurer, a director and owner of 16.67 percent. *Id.*

22. Grant proposes to work full time, 40 hours per week, as the station's general manager. Jamal Exh. 3. Grant will be responsible for all management, administrative, budgetary and programming decisions relating to operation of the station. *Id.* He will resign from his current employment. *Id.* Currently, Grant is Chairperson, CEO and 50 percent owner of Conceptions, Inc., a communications consulting firm in Nashville, which he founded in February 1990. Tr. 181. Grant intends to retain his ownership and chairperson's position and make Tracy Carr, a part-time employee and college student, the CEO. Tr. 203-04. Grant represented that Jackie Thompson, his current partner in the firm, will also assume day to day responsibilities. Tr. 204. Grant will spend about five hours per month on Conceptions business. Jamal Exh. 3. During that time, he intends to read reports and attend board meetings. *Id.* The firm is Grant's main support. Tr. 202. He will also reduce his civic activities to no more than 20 hours per week. Jamal Exh. 3, at 1.

23. On one occasion, Grant consulted Doss, President of Jamal's limited partner UCI, about settlement proposals. Tr. 161-62. He has had additional written and oral communications with him about financial matters. Tr. 156-58. Grant has an understanding with Doss that he will inform him about the status of the partnership every three or four months. Tr. 169-70. Section 7.03 of Jamal's limited partnership agreement prohibits limited partners from communicating regularly with the general manager on matters pertaining to the day to day operation of the partnership's business. Jamal Exh. 7.

24. Grant did not know all 13 of the owners of the limited partnership previously but he did know the former president of UCI, Dutch Morial. Tr. 146, 155, 241-44, 261, 298-99. After Grant met all the directors of UCI, on December 9, 1989, they decided to become partners. Tr. 302-03, 310. In the year and a half after the limited partnership was formed, Doss estimates that Grant communicated with him seven or eight times about mainly financial matters. Tr. 325-26. The partnership agreement provides that the general partner will be required to contribute a maximum of \$2,000. Tr. 207. The limited partner is obligated to contribute up to \$80,000. Tr. 206.

25. Jamal's counsel has represented other applicants in which UCI is a limited partner. Tr. 332-33. Counsel told UCI about opportunities to participate in broadcast proceedings involving facilities allocated to Jacksonville, Florida and Vancouver, Washington. Tr. 333, 336.

26. Grant has lived in Nashville for 26 years. Jamal Exh. 3, at 1. He was born in Nashville in June 1951 and lived there until September 1969, when he left to attend college. *Id.* He also lived in Nashville after completing college, from May 1973 to April 1978, and from January 1988 to the present. *Id.* He has promised to move to Mt. Juliet. *Id.*

27. From January 1991 to the present Grant has been a Board member of the Edgehill Community Center in south Nashville; he has spent 2-3 hours per month as a board member. Jamal Exh. 3; Tr. 192. From August 1990

to May 1991, he spent 12 hours per month on the Leadership Nashville Class of 1991. Jamal Exh. 3; Tr. 192-93. From 1988 to the present and 1974 to 1978, Grant has belonged to the Nashville NAACP. He was chairperson of the NAACP's Political Action Committee from 1976 to 1977. He has been Vice President and is now President of the NAACP. From September 1989 to May 1991 he spent 3-10 hours per week on Meharry/General Merger and from July 1989 to December 1990 as Chairman of the Ad Hoc Committee on Tennessee State University; he spent 7-8 hours per week. Jamal Exh. 3. He also devotes 15 hours per week to his job as President of the NAACP. *Id.* From April 1988 to December 1990, Grant spent 6 hours per month on the Black Health Care Task Force, an appointed position. *Id.*

28. Grant also spent 20 hours per week from May to November 1988 working for a presidential candidate. Jamal Exh. 3; Tr. 194. In January and February 1975, Grant spent 10 hours per week organizing "Black Expo." In summer of 1974, he was Coordinator for Youth Vote in a state senatorial campaign 10 hours per week. *Id.* From September 1973 to May 1974, Grant spent 12 hours per week as a volunteer wrestling coach at Father Ryan Junior High School. Jamal Exh. 3. Grant is an African American. *Id.*

29. Grant, in December 1989, after he filed his application, became the host of a weekly one-hour radio show on which he spends 3 hours per week. *Id.*

Prime

30. Prime does not propose integration and did not introduce any evidence on this issue.

Auxiliary power

31. All of the applicants propose auxiliary power. Lynn Exh. 1; Gelfand Exh. 4; Jamal Exh. 4; and Prime Exh. 4.

CONCLUSIONS

Issue 1: Jamal is financially qualified and it did not falsely certify.

32. Jamal proposes to borrow the money to build and operate the Mt. Juliet facility from CVC Capital Corporation. CVC has provided Jamal with a letter of reasonable assurance for a loan of \$500,000. Jamal estimates it will need approximately \$421,000. Jamal Exh. 18, at 27. CVC was provided with a copy of a detailed financial plan and a financial statement of Grant's. Before Michael Grant, Jamal's general partner, obtained the promise from CVC, he had discussed with Joerg Klebe, the owner of CVC, his financial plan and personal financial statement. During those discussions, Klebe was also considering becoming the limited partner in the Jamal proposal. The record indicates that Grant and Klebe discussed the standard elements of the loan including collateral and that Grant indicated his willingness to provide the collateral. Both parties had a thorough understanding of the proposal, the risks inherent in the loan and the available collateral. Mr. Klebe is an experienced broadcast lender. Lynn asserts that there was no real understanding about what the collateral would be and, therefore, Klebe could not have legitimately provided assurance. Lynn's assertion is inaccurate. Klebe said he understood that Grant had no personal assets that

could serve as collateral but that if he did at the time the loan was made they both understood those assets would serve as collateral in addition to the station's.

33. When Grant decided shortly before the application was filed that he did not want to form a partnership with Klebe, he filed as an individual. CVC then wrote a second letter to Grant and offered assurance of financing. Lynn urges that because the second letter of assurance was sent the day before Grant filed his application, he could not have certified and still have complied in good faith with the instructions to Form 301 which require that documentation be in hand when the certification is made. There is no question that Grant acted in good faith when he certified. CVC had already sent him a letter of assurance when it looked like the applicant would be a partnership with Grant as general partner. CVC had told Grant two days before he filed that it would also make the loan if he applied as an individual. The second letter differs in no material respect from the first. Under these circumstances it cannot be concluded that Jamal did not truthfully certify.

34. Lynn also urges that Grant was not financially qualified because he did not have a source for the legal, engineering and filing fees that would arise in prosecution of his application. The current Form 301 does not appear to include prosecution expenses in the list of items to be certified. The instructions refer only to engineering and legal fees that will arise in construction and operation. Grant did include part of the amount for prosecution fees in his budget provided he could not raise the money through capital calls. Grant mistakenly believed that he could use some of the CVC loan for prosecution fees. Instead of relying on CVC money, before certification, Grant reached an agreement about prosecution fees in which he is being advanced their cost by his counsel and engineer and he will make monthly payments from his salary. He has made the payments. In January 1990, Grant amended his application and became the partnership he originally intended and the limited partner is committed to provide \$80,000. That amount is more than adequate to meet the \$27,050 Grant estimates the prosecution of Jamal's application will cost. The record shows that Grant had made provision for prosecuting his application when he certified and that he has more than enough money to do so today. It is irrelevant to argue, as Lynn does, that Grant did not have sufficient assets to meet future fees when he began the proceeding. Grant, his counsel, and his engineer never intended that he would use assets to pay the costs of prosecution. Jamal has demonstrated that it is financially qualified.

Issue 2: The proposal that would, on a comparative basis, best serve the public interest.

Diversification of ownership of the mass media

35. Lynn and Jamal have no attributable mass media interests. Prime's owners own, through corporations and partnerships, four radio broadcast stations. Gelfand's spouse owns a radio broadcast station and a permit for a new television station. Gelfand argues that she has met the criteria for rebutting the spousal attribution presumption. She urges that she meets the test stated by the Review Board in *Richard P. Bott, II*, 4 FCC Rcd 4924, 4927 (Rev. Bd. 1989). There the Board stated that the spouse attempting to avoid attribution must demonstrate "no prior interest or involvement" in the media properties. Ms. Gelfand

has provided legal advice to her spouse about his media interests, which exhibits an interest in the media properties. The spouse must also show a history of individual and separate business interests. While Ms. Gelfand has practiced law, separate and apart from her spouse, they have invested in real estate together and in a music publishing company, which is located in Nashville. The spouse must also demonstrate that she is the sole financial force behind the application. Ms. Gelfand maintains that she has written out all checks for her application but she concedes that the money has come from an account she shares with her spouse. Ms. Gelfand claims that she will return the money she has drawn on the joint account with her own separate funds, but she has not done so. It was incumbent on Ms. Gelfand to show that her spouse has not participated in station affairs in any way. Mr. Gelfand has discussed with Ms. Gelfand her proposal and Ms. Gelfand looks to him for advice because he has superior knowledge about the broadcast business. Ms. Gelfand has also relied on legal and engineering assistance from the same people her spouse relies on. Ms. Gelfand described her discussions with her spouse as being those that two friends or a married couple might have about their interests. It is apparent that Ms. Gelfand has followed her spouse's lead when she hired the same lawyer and engineer. She failed to define the number and breadth of her discussions about the station with her spouse, although she did indicate they would continue. Ms. Gelfand was required to show that her spouse has no actual interest in her proposal. Gelfand did not make that showing by explaining in detail what their discussions were about. On the basis of the record facts, it cannot be said that Gelfand has rebutted the presumption of spousal attribution.

36. Lynn and Jamal are to be preferred over Prime and Gelfand because they have no media interests. Gelfand is to be preferred over Prime because her interests are fewer. Prime is not qualified to be compared because it has no antenna site and is, therefore, unqualified.

Integration of ownership

37. Lynn, Jamal and Gelfand each intend to integrate their principals into the management of the station on a full-time, 40 hour per week, basis.

38. The opposing applicants urge that Carolyn Lynn's promise cannot be fully credited because she has no plan to dispose of her current business, Batteries Unlimited. Lynn points out in its reply that Ms. Lynn will either sell her business or transfer her accounts to a colleague. In addition, Lynn explains that Ms. Lynn only spends 15 hours a week on the business now and that leaves more than enough time to meet her 40 hours per week commitment to the station. The record does not support the claim that Ms. Lynn's promise is unreliable. She has worked in business activities before with her spouse and they have been sold. She has alternative plans to allow her to work at the station. The opposing applicants have not shown that her plans are unrealistic.

39. Jamal argues that Ms. Lynn's role will not be managerial. Lynn responds by pointing to Mr. Lynn's testimony that Ms. Lynn will supervise sales and office functions. Ms. Lynn's testimony was consistent with that of her spouse. In another business that the Lynns owned and operated, Ms. Lynn described her duties as being those of a business manager. There is no evidence in this proceeding that Ms. Lynn has made any of the decisions involved in prosecuting Lynn's application. Mr. Lynn has made the

key decisions about who to hire for pursuing Lynn's proposal for this facility, he used his balance sheet to certify the applicant's financial qualifications, and he arranged for the antenna site. Lynn asserts that these decisions follow from Mr. Lynn's role as proposed station manager. Ms. Lynn will report to her spouse. While Ms. Lynn is to be the business manager, her claim that she will be in charge of the station's financial affairs is dubious on this record where she never took any initiative in preparing the application, arranging for the necessary services to pursue Lynn's proposal before the Commission or planning the financial future of the station. Lynn cites various times that Ms. Lynn accompanied her spouse to look at the antenna site, visit their attorney who wrote the partnership agreement, or discuss between them various aspects of the proposal. But there is no evidence that Ms. Lynn took the initiative in any part of the proposal. Lynn points out that Ms. Lynn will oversee EEO but when parts of the application were prepared about Lynn's EEO proposal, Mr. Lynn supplied the answers. The record, however, does not demonstrate that she will not oversee sales at the station or that she will not manage the office. If Ms. Lynn had never operated a business before, her lack of meaningful activity in pursuing the proposal might warrant denying her integration credit. But she has operated a business and participated in one with her spouse in essentially the same capacity that she proposes here. Lynn is entitled to 100 percent integration.

40. Gelfand is also entitled to 100 percent integration.

41. Jamal proposes that Michael Grant will spend full time, 40 hours per week at the station as the general manager. Lynn argues that Grant is not independent of UCI, Jamal's limited partner, and Prime argues that the relationship between Grant and the limited partner is not genuine because they did not know one another before they became partners. Prime and Lynn also urge that Grant has not acted independently of the limited partner. The record does not support those claims. Grant filed without a limited partner in October 1989 and it was not until December 1989 that UCI joined with Grant. It is also not accurate to assert that Grant and the owners of UCI were unknown to each other. Grant knew the former president of UCI, Dutch Morial. Mr. Morial died on December 24, 1989. Tr. 146, 155, 241-44, 298-99. Grant met each of the directors of UCI before the investment was made by UCI. Tr. 147, 302-03. It is evident that they gave extensive consideration to their partnership and that the partnership was negotiated at arms length. The partnership agreement went through seven drafts. Tr. 153, 236. Although Grant did not have broadcast experience when he filed, he started a radio talk show in December 1989 and before he filed his application he was also head of the NAACP's Communications Committee. Furthermore, Grant selected Jamal's counsel, and its engineer; he arranged for the antenna site; and he obtained financing for the project.

42. While Grant and the president of UCI have talked to one another, the record shows that it was about UCI's contributions to Jamal and the status of the Commission's consideration of Jamal's application. On one occasion Grant spoke with UCI about a settlement offer.

43. Gelfand does not believe that Grant will turn over the operation of his communications consulting firm to co-owner, Jackie Thompson, and Tracy Carr, who has worked at the firm. The plan is not inherently unbelievable and Gelfand has not shown facts which will make the

plan impossible. Lynn argues that Grant has not put forward an adequate plan for reducing his extensive community service time. Jamal points out that there is no evidence that his community involvement is required and that Grant does not have discretion to participate at the level he stated he will. Without more, Lynn's argument is speculative. Grant is entitled to credit for full-time integration of ownership into management.

44. The quantitative integration proposals of Lynn, Gelfand, and Jamal are equal. Qualitatively Jamal is to be preferred over Lynn and Gelfand. Jamal's general partner, Grant, has lived in the primary service area for twenty-six years. His list of civic activities is extensive and current. He has spent substantial time working on community matters. He will move to Mt. Juliet. The Lynns have lived in Mt. Juliet for 14 years and in the proposed service area for six additional years. Their list of civic activities is also extensive, although they have not provided an estimate of the actual amount of time they spent on each activity like Grant has. Despite not having complete information about Lynn's civic activities, it appears that there is no quantifiable difference between Jamal and Lynn on their association with the service area. Jamal, however, is to be preferred over Lynn because Jamal's general partner, Grant, is an African-American. In addition, before the cut-off date for filing amendments as of right, Grant began a radio talk show. For that effort, Grant is also entitled to additional merit.

45. Gelfand has promised to move to Nashville. Six months before Gelfand filed her application, her music publishing company bought an apartment for her to stay in when she visits Nashville on business. Every six weeks she spends a few days in Nashville. Her relationship to the service area is too transitory to be characterized as being one of a local resident. Gelfand has no other qualitative attributes.

46. Jamal and Lynn are to be preferred over Gelfand on diversification of ownership. Jamal is to be preferred over all applicants on integration of ownership. All of the applicants propose auxiliary power. The public interest would best be served by granting Jamal's application.

ACCORDINGLY, IT IS ORDERED that the applications of Grady Lynn and Carol Lynn d/b/a Lynn Broadcasting (File No. BPH-891011MJ), Edith M. Gelfand (File No. BPH-891012MN), Q Prime, Inc. (File No. BPH-891012MT) ARE DENIED and the application of Jamal Broadcasting L.P. (File No. BPH-891012MS) for a construction permit for a new FM station on Channel 294A in Mt. Juliet, Tennessee IS GRANTED¹ provided:

Before PROGRAM TEST AUTHORITY is authorized by the Commission a fence must be erected at such distances and in such a manner as to prevent the exposure of humans to radio-frequency radiation in excess of the American National Standards Institute Guidelines (OST Bulletin No. 65, October 1985). The fence must be of a type which will preclude casual or inadvertent access, and must include warning signs at appropriate intervals which describe the nature of the hazard. Permittee shall submit documentation of compliance with this special operating condition along with the form 302, application for license, and the request for PROGRAM TEST AUTHORITY.

FEDERAL COMMUNICATIONS COMMISSION

Edward J. Kuhlmann
Administrative Law Judge

FOOTNOTE

¹ In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision will become effective 50 days after its public release pursuant to Sec. 1.276(d).

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

FEB 26 1988

IN REPLY REFER TO:

David E. Honig, Esq.
6032 Ocean Pines
Berlin, Maryland 21811

Dear Mr. Honig:

This will respond to your recent letter concerning the applicability of the Commission's multiple ownership rules to Minority Enterprise Small Business Investment Companies (MESBICs). Specifically, you inquire whether CVC Capital Corporation (CVC), a MESBIC, would be permitted to make investments in more than 14 FM broadcast stations if its investments were "sufficiently insulated."

Under the Commission's attribution standards, debt and properly insulated equity interests are considered nonattributable for purposes of determining compliance with the multiple ownership rules. In its Attribution Order, the Commission provided specific guidance as to the types of interests it would consider noncognizable by virtue of their insulated nature. See Report and Order in MM Docket No. 83-46, 97 FCC 2d 997 (1984), recons. granted in part, 58 RR2d 604 (1985), further recons. granted in part, 1 FCC Rcd 802 (1986). Among these interests were: (1) nonvoting common or preferred stock; (2) various nonvoting interests carrying rights of conversion to voting interests, such as convertible nonvoting stock and convertible debentures, as long as such interests remain unconverted; (3) voting stock held through qualified voting trusts; (4) minority voting stock interests where a single majority stockholder exists; and, (5) properly insulated limited partnership interests. Assuming the use of qualified, nonattributable investment mechanisms, such as those noted, and assuming further that the investments present no conflict under the Commission's cross-interest policy, CVC would be free to acquire equity interests in as many FM or other broadcast properties as it may desire.

It should be noted that the nonattributable nature of the above-described investments is premised on the relatively uninfluential character of the interests themselves and not on an assumption that MESBICs constitute "passive" investors. Indeed, the Commission expressly declined in its Attribution Order to extend passive investor status, and the higher 10% attribution benchmark that such status conveys, to MESBICs. See 97 FCC 2d at 1016. In doing so, the Commission recognized the "critical role these entities play in the establishment and expansion of new and small broadcast

companies, and particularly the entry and support of minority owned enterprises. . . ." Id. It concluded, however, that the above-noted noncognizable investment mechanisms "should satisfy the investment flexibility needs of these companies without extension to them of passive status. . . ." Id.

I trust the foregoing has been responsive to your inquiry.

Sincerely,

A handwritten signature in cursive script, appearing to read "Alex D. Felker", with a long horizontal flourish extending to the right.

Alex D. Felker
Chief, Mass Media Bureau

CERTIFICATE OF SERVICE

I, Katherine D. Wright, a secretary in the law offices of Rosenman & Colin, do hereby certify that on this 12th day of June, 1992, I have caused to be hand-delivered a copy of the foregoing "COMMENTS OF CVC CAPITAL CORPORATION (A "MESBIC")" to the following:

Roy J. Stewart, Chief*
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Federal Communications Commission
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Room 314
Washington, D.C. 20554

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